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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: DEPUTY

Attorneys for Defendant HOMETOWN BUFFET, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BARBARA HUBBARD,

Plaintiff,

vs.

HOMETOWN BUFFET, INC., dba HOMETOWN FEFFET #0703; LAKHA PROPERTIES - SAN DIEGO, LLC,

Defendants.

CASE NO. 07 CV 2303 DMS RBB

ANSWER TO COMPLAINT BY HOMETOWN BUFFET, INC.

Action Filed: 12/07/2007

As and for its answer to Complaint herein, Hometown Buffet, Inc., a corporation lawfully conducting business in the State of California, responds to the Complaint for itself alone, admitting, denying and alleging as follows:

I. SUMMARY

1. Answering Defendant admits Plaintiff has filed the instant action but otherwise denies the allegations of Paragraph 1.

2. Answering Defendant denies the allegations of Paragraph 2.

II. JURISDICTION

3. Answering Defendant admits the Court has original jurisdiction of the claims.

4. Answering Defendant denies that the Court can or should exercise

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supplemental jurisdiction over other claims.

5. Answering Defendant denies the allegations of Paragraph 5.

III. VENUE

6. Answering Defendant denies the allegations of paragraph 6 but admits venue is appropriate.

IV. PARTIES

7. Due to vagueness, Defendant lacks sufficient information or belief to admit or deny the allegations of Paragraph 7, and therefore denies said allegations on that basis.

8. Answering Defendant lacks sufficient information or belief to admit or deny the allegations of Paragraph 8, and therefore denies said allegations on that basis.

9. Answering Defendant denies the allegations of Paragraph 9 as phrased.

10. Answering Defendant denies the allegations of Paragraph 10, including its subparts.

11. Answering Defendant denies the allegations of Paragraph 11.

12. Answering Defendant denies the allegations of Paragraph 12.

13. Answering Defendant denies the allegations of Paragraph 13.

14. Answering Defendant denies the allegations of Paragraph 14.

15. Answering Defendant denies the allegations of Paragraph 15.

V. FIRST CLAIM

Americans With Disabilities Act of 1990

16. Answering Defendant refers to and incorporates by reference its responses to Paragraphs 1 through 15, inclusive, as though set forth in full.

17. Paragraph 17 purports to state law and as such no response is required.

18. Answering Defendant denies the allegations of Paragraph 18.

Failure to Remove Architectural Barriers

19. Answering Defendant denies the allegations of Paragraph 19.

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20. Answering Defendant denies the allegations of Paragraph 20.

21. Answering Defendant denies the allegations of Paragraph 21.

22. Answering Defendant denies the allegations of Paragraph 22.

Design and Construction

42 U.S.C. § 12183(a)(1)

23. Paragraph 23 purports to state law and therefore no response is required.

24. Answering Defendant admits the allegations of Paragraph 24.

25. Answering Defendant denies the allegations of Paragraph 25.

Alterations

42 U.S.C. § 12183(a)(2)

26. Paragraph 26 purports to state law and therefore no response is required.

27. Paragraph 27 purports to state law and therefore no response is required.

28. Answering Defendant admits the allegations of Paragraph 28.

Policy and Practices

42 U.S.C. § 12183(b)(2)(A)(ii)

29. Paragraphy 29 purports to state law and therefore no response is required.

30. Answering Defendant denies the allegations of Paragraph 30.

31. Answering Defendant denies the allegations of Paragraph 31.

32. Answering Defendant denies the allegations of Paragraph 32.

VI. SECOND CLAIM

Disabled Persons Act

Civil Code §§ 54 *et seq.*

33. Answering Defendant refers to and incorporates its responses set forth in Paragraphs 1 through 32, inclusive, as though set forth in full.

34. Paragraph 34 purports to state law and therefore no response is required.

35. Paragraph 35 purports to state law and therefore no response is required.

36. Paragraph 36 purports to state law and therefore no response is required.

37. Answering Defendant denies the allegations of Paragraph 37.

38. Answering Defendant denies the allegations of Paragraph 38.

39. Answering Defendant denies the allegations of Paragraph 39.

VII. THIRD CLAIM

Disabled Persons Act

Civil Code §§ 54 *et seq.*

40. Answering Defendant refers to and incorporates its responses set forth in Paragraphs 1 through 30, inclusive, as though set forth in full.

41. Paragraph 41 purports to state law and therefore no response is required.

42. Paragraph 42 purports to state law and therefore no response is required.

43. Paragraph 43 purports to state law and therefore no response is required.

44. Answering Defendant denies the allegations of Paragraph 44.

45. Answering Defendant denies the allegations of Paragraph 45.

46. Answering Defendant denies the allegations of Paragraph 46.

47. Answering Defendant denies the allegations of Paragraph 47.

VIII. FOURTH CLAIM

Denial of Full and Equal Access to a Person With Physical Disabilities in a Public Facilities

48. Answering Defendant refers to and incorporates its responses set forth

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in Paragraphs 1 through 13, inclusive, as though set forth in full.

49. Paragraph 49 purports to state law and therefore no response is required.

50. Paragraph 50 purports to state law and therefore no response is required.

51. Answering Defendant denies the allegations of Paragraph 51.

52. Answering Defendant denies the allegations of Paragraph 52.

AFFIRMATIVE DEFENSES

As and for its affirmative defenses, Answering Defendant alleges on information and belief.

FIRST AFFIRMATIVE DEFENSE

(Failure to State A Claim For Relief)

53. Neither the Complaint nor any cause of action therein states facts sufficient to constitute a claim for relief against Answering Defendant.

SECOND AFFIRMATIVE DEFENSE

(Unclean Hands)

54. Plaintiff comes into this Court with unclean hands, and under the circumstances of this case, such doctrine bars or limits any recovery against Answering Defendant.

THIRD AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

55. Answering Defendant is informed and believes and thereon alleges that Plaintiff has failed to mitigate and avoid her alleged injury and damages, if any, and any damages awarded to Plaintiff should be reduced accordingly by such failure to mitigate damages.

FOURTH AFFIRMATIVE DEFENSE

(Comparative And Contributory Negligence)

56. Plaintiff, by her actions and conduct, has failed to exercise reasonable

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care and diligence on her own behalf, thereby causing or contributing to her alleged injury and damages, if any. Plaintiff's recovery therefore must be reduced or eliminated altogether by the proportion of damages caused by her own acts and conduct.

FIFTH AFFIRMATIVE DEFENSE

(Lack of Standing)

57. Plaintiff lacks standing to maintain her claims herein.

SIXTH AFFIRMATIVE DEFENSE

(Statutory Compliance)

58. Plaintiff's claims are barred or reduced because Answering Defendant performed, or is in the process of performing, all readily achievable architectural barrier removals as may be required by law, if any.

SEVENTH AFFIRMATIVE DEFENSE

(Statutory Compliance)

59. Plaintiff's claims herein are barred because Answering Defendant has remediated, or is in the process of remediating any alleged access barrier with reasonable and appropriate alternative methods of access; and/or Plaintiff's claims are barred because removal of alleged access barriers as claimed by her is not readily achievable and no alternative method of access can be provided without fundamentally altering the nature of the goods, services and facilities offered by Answering Defendant; and/or Answering Defendant has met all statutory obligations to Plaintiff or any other persons with disabilities with respect to the matters about which Plaintiff complains.

EIGHTH AFFIRMATIVE DEFENSE

(No Actionable Wrong)

60. This Court lacks subject-matter jurisdiction over this matter because Plaintiff is unable to prove an actionable wrong.

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NINTH AFFIRMATIVE DEFENSE

(No Actionable Wrong)

61. Plaintiff is not entitled to an award of statutory damages, *inter alia*, because she did not visit, nor was deterred from visiting, Answering Defendant's premises on any particular occasion when the site was not accessible or appropriate accommodations and access provided.

TENTH AFFIRMATIVE DEFENSE

(No Statutory Damages)

62. Answering Defendant, at all times, acted reasonable, in good faith, and in a non-discriminatory manner.

ELEVENTH AFFIRMATIVE DEFENSE

(Good Faith)

63. Although the basis of Plaintiff's claims of alleged violations of law are not presently known and are not clear from the Complaint, Answering Defendant provisionally alleges that removal of any physical barriers, to the extent that any exist, would be structurally impracticable and not required by law.

TWELFTH AFFIRMATIVE DEFENSE

(Impracticality)

64. Plaintiff's claims herein are barred by her prior settlement agreement and release of the defendant.

THIRTEENTH AFFIRMATIVE DEFENSE

(Release)

65. Answering Defendant is informed and believes an thereon alleges that Plaintiff's claims of injuries, harm and emotional distress are barred or reduced by reason that Plaintiff presents multiple such claims against various parties in various actions alleging those same injuries and attributing them to those parties.

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FOURTEENTH AFFIRMATIVE DEFENSE

(Harm by Others)

66. Plaintiff's claims are limited by the provision of California Civil Code Section 1431.2.

FIFTEENTH AFFIRMATIVE DEFENSE

(California Civil Code Section 1431.2)

67. Plaintiff's claims for attorneys' fees are barred because they were not actually incurred, necessarily incurred, or reasonably incurred.

SIXTEENTH AFFIRMATIVE DEFENSE

(No Recovery of Attorneys' Fees)

68. Plaintiff has waived and is estopped from asserting her claims herein.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Waiver and Estoppel)

69. At all times relevant, Answering Defendant conducted itself in good faith and in a legitimate exercise of business discretion.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Good Faith)

70. Plaintiff's claims are bared by the applicable statute of limitations, including but not limited to California Code of Civil Procedure sections 338 and 340, California Health and Safety Code sections 19955, *et seq.*, and 42 U.S.C. § 2000, *et seq.*

NINETEENTH AFFIRMATIVE DEFENSE

(Statutes of Limitation)

71. Answering Defendant presently has insufficient knowledge or information upon which to form a belief as to whether it may have additional, as yet unstated, affirmative defenses available. Answering Defendant reserves the right to assert additional affirmative defenses in the event discovery indicates they would be appropriate.

WHEREFORE, Answering Defendant prays that Plaintiff take nothing by her Complaint, that the Court enter judgment dismissing the Complaint with prejudice and each of its purported claims for relief; that the Court award Defendant its reasonable expenses and costs of suit, including but not limited to, reasonable attorneys' fees if and to the extent permitted by law; and that the Court grant Answering Defendant such other and further relief as the Court may deem just and proper.

DATED: January 1, 2008

KIRBY NOONAN LANCE & HOGE LLP

By: ______________________________
Charles T. Hoge
Attorneys for HOMETOWN BUFFET, INC.

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PROOF OF SERVICE

Hubbard v. Hometown Buffet, Inc., et al.
Case No. 07 CV 2303 DMS RBB

I, the undersigned, declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed in the County of San Diego, California. My business address is 600 West Broadway, Suite 1100, San Diego, California 92101-3387.

On January 3, 2008, at San Diego, California, I served the following document(s) described as:

- ANSWER TO COMPLAINT BY HOMETOWN BUFFET, INC.

on the parties in said action by placing a true copy thereof in a separate sealed envelope for each addressee named hereafter, addressed to each such addressee respectively as stated on the attached service list, which reflects the address last given by each such addressee on any document filed in the action and served on this office.

SEE ATTACHED LIST

☒ **BY MAIL:** I am readily familiar with our business practice for collecting, processing and mailing correspondence and pleadings with the United States Postal Service. Such correspondence and pleadings are deposited with the United States Postal Service on the same day that they are placed for mailing in the ordinary course of business. I sealed each envelope and, with the postage thereon fully prepaid, placed it for mailing in accord with our business' practice. (C.C.P. § 1013(a) and (b))

☒ **STATE COURT:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 3, 2008, at San Diego, California.

S Markham

Shirley A Markham

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SERVICE LIST
Hubbard v. Hometown Buffer, Inc.
Case No. 07 CV 1303 DMS RBB

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